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Nos. 86-2043, 86-2044

In The

Supreme Court of the United States

OCTOBER TERM, 1986

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK: PAUL L. GIOIA, CHAIRMAN; and COMMISSIONERS EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD, ROSEMARY S. POOLER, and GAIL GARFIELD SCHWARTZ, NEW YORK TELEPHONE COMPANY and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioners,

vs.

JOSEPH CAHILL,

Respondent.

BRIEF OF *AMICUS CURIAE* ROCHESTER TELEPHONE CORPORATION IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INTEREST OF ROCHESTER TELEPHONE CORPORATION

Rochester Telephone Corporation ("RTC") submits this brief as *amicus curiae* in support of the petitions for a writ of certiorari

to the Court of Appeals of the State of New York. RTC's submission is based upon the written consent of all parties, which are submitted to this Court under separate cover, in lieu of a motion for leave to file.

RTC's interest in the outcome of the petitions arises because, like petitioners New York Telephone Company and Central Hudson Gas & Electric Corporation, it is a privately-owned utility operating in New York State subject to the jurisdiction of petitioner Public Service Commission ("PSC"). RTC contributes a portion of its revenues to charities which it feels benefit its community. Thus, the decision below, which improperly recognizes a Constitutional cause of action challenging a utility's inclusion of charitable contributions in the calculation of telephone rates, adversely affects RTC as directly as either of the petitioner-utilities. For this reason, RTC joins such petitioners and the PSC in urging this Court to grant a writ of certiorari.

REASONS FOR GRANTING THE WRIT

A. *The New York State Court of Appeals Has Misapplied This Court's Rulings on The Concept of State Action*

It is beyond dispute that the First and Fourteenth Amendments to the U.S. Constitution offer no shield against private conduct. *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 349 (1974), citing *Shelley v. Kraemer*, 334 U.S. 1 (1948). The New York Court of Appeals, however, has misconstrued and misapplied this Court's delineation of what constitutes private conduct, immune from the Fourteenth Amendment, and what constitutes state action, subject to the Fourteenth Amendment.

State action requires that there be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351. In particular, a state

utility commission's approval of a request from a regulated utility to institute a practice which a less regulated business would be free to institute without approval does not transmute the practice into "state action" unless the commission has put its own weight on the side of the proposed practice by ordering it. *Jackson,* 419 U.S. at 357. Mere acquiescence by the State in the private conduct is insufficient. *Id.* Thus, this Court held in *Jackson* that a private utility's termination of electric service did not constitute state action even though the tariff containing the provision for termination had been approved by the state public service commission.

Here, the decision to make a charitable contribution is a private decision made by utility management. Management determines whether the utility will make any charitable contributions at all, the charities to which the utility will contribute, how much the utility will contribute, and how much to propose as includible in the calculation of its rates. The PSC plays no part in any of these decisions. It merely approves or disapproves a total dollar amount of charitable expenditures for inclusion in the calculation of the utility's final rates.

Based on the record, no principled distinction can be made between the result in *Jackson* and the decision below. The New York court erroneously relied on the superficial difference that respondent Cahill named the PSC as defendant, whereas the plaintiff in *Jackson* sued the private utility. *See Cahill v. Public Service Commission,* 69 N.Y.2d 265, 272 (1986) ("In *Jackson* the suit was against the utility and not the Pennsylvania Utility Commission"). Cahill phrased his action in terms of the PSC's conduct, not the utility's conduct. The court therefore reasoned that it need not even consider this Court's test for determining the presence of state action. *See Jackson, supra; Blum v. Yaretsky,* 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982); *Rendell-Baker v. Kohn,* 457 U.S. 830 (1982); and *Flagg Bros. v. Brooks,* 436 U.S. 149 (1978).

It is clear, however, that without the private actions of the petitioner-utilities, Mr. Cahill would have nothing upon which to base his First Amendment objection. Respondent Cahill purchases telephone and electric services from petitioner-utilities just as millions of other consumers across New York State purchase telephone, gas, and electric services from their respective utilities. The PSC determines the final price which Mr. Cahill and others will pay for their telephone and electric service. This is the extent of the state action in this case. However, respondent does not claim a First Amendment right not to pay for telephone and electric service. Respondent instead objects to some of the expenses which the petitioner-utilities incur in providing those services. State action by the PSC, which neither forbids nor mandates that the utilities incur those expenses, is therefore not the true subject of respondent's action.

Respondent Cahill asserts that his freedom of religion and freedom of association are impinged upon because he must indirectly contribute to the charities which the utility supports, and that the compulsion to pay originates with the PSC. *See Cahill,* 69 N.Y.2d at 269. Yet, the plaintiff in *Jackson* was forced to the same extent by the state commission to pay for termination procedures which allegedly violated her due process rights. Nonetheless, this Court found that private utility conduct was the true subject of that action.

Moreover, this Court in *Blum v. Yaretsky, supra,* unequivocally rejected the approach of the New York Court of Appeals. *Blum* involved a class of Medicaid patients who challenged the decisions of physicians and nursing home administrators to transfer them to facilities providing a lower level of care. The patients alleged violations of their due process rights under the Fourteenth Amendment.

This Court reaffirmed, however, that Constitutional standards

may be invoked only when the State is *responsible* for the specific conduct of which the plaintiff complains. *Blum,* 457 U.S. at 1004. This normally occurs only when the State has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State," or "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.' " *Blum,* 457 U.S. at 1005. Using these principles, the Court determined that no state action takes place when a State reduces a patient's Medicaid benefits in response to a physician's decision to transfer the patient.

The decision in the instant case is insupportable in the face of *Blum.* As discussed above, the PSC responds to, but is not responsible for the contribution decisions of private utilities. Indeed, the PSC's 1970 policy decision to allow charitable contributions as a component of telephone rates was itself a response to the existing practice of private utilities in making charitable contributions. The terms of the policy further minimize the State's encouragement to the utilities by tying allowable contributions to inflation-adjusted pre-1970 levels. *But see Blum,* 457 U.S. at 1007-08 (state regulations required nursing homes to "make all efforts possible" to transfer patients to the appropriate level of care) Notably, despite the State policy of so limiting allowable contributions, petitioner New York Telephone nonetheless spent several million dollars more than it was permitted to include as an allowable operating expense (Joint Appendix at 41). In contrast, in *Blum* the State reduced its Medicaid benefits to the precise level which implemented the physicians' transfer decisions. Medicaid patients were compelled to accept their transfer because they could no longer afford to stay at the higher level of care facility. Nonetheless, the Court found no state action.

Although it acknowledged the holdings in *Jackson* and *Blum,* the New York Court of Appeals nonetheless distinguished them

on the very ground rejected by *Jackson,* i.e., that a private utility's monopoly status is the determinative factor in finding state action. *Cahill,* 69 N.Y.2d at 271. ("Because the utility is a monopoly the customer must pay or be deprived of his right to utility service.") However, as this Court stated,

> assuming that [the State granted or guaranteed Metropolitan a monopoly], this fact is not determinative in considering whether Metropolitan's termination of service to petitioner was "state action" for purposes of the Fourteenth Amendment.

Jackson, 419 U.S. at 351-2.

The *Cahill* majority mistakenly interprets *Blum* to hold that whether the State "coerces" the plaintiff determines whether state action is present. *See Blum,* 457 U.S. at 1004. *Blum* does not stand for this proposition. The State's coercion of the regulated entity, not the plaintiff, creates state action. *Id.* Even if *Blum* could be interpreted in the manner employed by the *Cahill* majority, the *Cahill* holding cannot be reconciled with *Blum.* The Medicaid patients in *Blum* faced an equal or greater level of coercion to accept the allegedly unconstitutional transfer because the State correspondingly reduced their Medicaid benefits. Nor can the *Cahill* holding be reconciled with *Jackson* where the plaintiff was also "coerced" into having her electricity shut off without a hearing.[1]

If the New York Court's holding is allowed to stand, therefore, a Constitutional claim in violation of the *Jackson* and *Blum* holdings can be created when an individual simply phrases his or her legal claim in terms of "compulsion to pay". Such holding is

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[1] Moreover, pursuant to the majority's reasoning, any private corporation with significant monopoly power would also be subject to a customer's challenge to its spending decisions, as that customer is equally coerced into buying the company's product because the State has failed to disperse its monopoly power.

particularly inconsistent with *Jackson* and *Blum* in light of the record below, which demonstrates that private utilities, not the PSC, would make the decision whether to terminate service to customers who refuse to pay rates because they are based, to some trivial extent, upon charitable contributions.

B. *Abood v. Detroit Board of Education Is Inapplicable to This Case And to Non-Labor Regulatory Situations In General*

The court below improperly extended *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), a case in which the State took direct and obvious action, to an entirely dissimilar situation where the only state action consisted of a passive, authorizing government policy. In *Abood,* the Court took state action for granted because a government employer forced state employees to deduct union dues from their state paychecks, under certain penalty of losing their government jobs. The "coercion" in *Abood* originated from the State. The employees were therefore permitted to challenge the service fee deductions on First Amendment grounds.

In this action, however, customers such as respondent are not threatened by the State or with any loss of government employment or government services. *Cf. Rendell-Baker, supra* (no state action where employee discharged from private school almost wholly supported by government funds, and extensively regulated). They instead face the potential termination by the utility of privately provided utility services if they refuse to pay their utility bills. Thus, even if the majority below were correct in comparing the instant case to *Abood,* they should have reached the opposite conclusion.

Moreover, the nexus between the state action and the plaintiffs' claimed First Amendment violation in *Abood* was much stronger than that present here, in a non-labor relations context. The state statute in *Abood* designated the defendant union as

plaintiffs' exclusive representative, pursuant to the complex labor relations scheme set up by Congress and the States. Thus, when the union spent the money received from plaintiffs for ideological purposes, the union was perceived as acting on behalf of the plaintiffs. Plaintiffs' associational and free speech rights were directly impaired by these expenditures.

Here, in contrast, respondent Cahill is merely a utility customer. He buys telephone and electric service. A utility's expenditures, like the expenditures of any retail or service business, are not perceived as an expression of its customers' views, but of its own views. Thus, the nexus between the State's failure to forbid utilities from totally excluding charitable contributions from their proposed operating expenses and any impairment of Cahill's associational rights is slender indeed, if not wholly illusory, in comparison to that present in *Abood*.

C. *Certiorari Should Be Granted to Resolve the Conflicts Which The Decision Below Has Created With Federal Courts of Appeals*

The State of New York is now directly in conflict with the Eleventh Circuit as to whether the actions of a privately owned utility are subject to challenge under the First and Fourteenth Amendments. In *Carlin Communication, Inc. v. Southern Bell Telephone*, 802 F.2d 1352 (11th Cir. 1986), the Florida Public Service Commission, after a hearing, approved a telephone company's refusal to provide "dial-a-message" services to companies offering sexually explicit or suggestive messages. The plaintiff company, which offered such services, had challenged the refusal and the resulting tariff pursuant to 42 U.S.C. § 1983 as a violation of its First Amendment free speech rights. Nonetheless, the Elev-

enth Circuit found no state action.[2] Thus, telephone companies in Florida may operate without being subject to such Constitutional restrictions, whereas they may not in New York.

The holding of the court below also conflicts with the holdings of two other federal courts of appeals that *Abood* cannot be extended to situations involving only a government policy and a private employer. *See Price v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,* 795 F.2d 1128 (2d Cir. 1986), *cert. petition pending,* 55 U.S.L.W. 3593 (1987); *Kolinske v. Lubbers,* 712 F.2d 471 (D.C. Cir. 1983). In *Price* the Second Circuit rejected union members' First Amendment challenge to the manner in which their union spent their dues. The court concluded that state action is not present simply because the National Labor Relations Act ("NLRA") authorizes private employers to maintain a union shop. In *Kolinske* the court rejected the First Amendment challenge of non-union employees in an agency shop to the union's refusal to pay them strike benefits. The court held that the union and employer's decision to adopt an agency shop clause which is authorized by the NLRA does not constitute state action. *Also see Communication Workers v. Beck,* 800 F.2d 1280 (4th Cir. 1986), *cert. granted,* No. 86-637, 55 U.S.L.W. 3803 (June 1, 1987) (five out of ten justices refused to find state action where employees in agency shop authorized by NLRA challenged union's use of fees under First Amendment; two justices found state action; three justices did not reach the issue).

The *Price* decision binds employees within New York State. If the *Cahill* holding is allowed to stand, then, the decisions of a private utility in New York which are authorized by a government policy will be attributable to the State when a customer chal-

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[2] The Eleventh Circuit correctly noted that if state action is present, the defendant has acted under color of law, as required by 42 U.S.C. § 1983. *Lugar,* 457 U.S. at 935.

lenges them, but, anomalously, not when a utility employee challenges them. This unprincipled and unexplainable difference must be promptly resolved by this Court.

The propriety of the New York Court of Appeals' extension of *Abood* to situations involving private businesses is the very issue which this Court will soon decide in *Communication Workers v. Beck, supra* (whether non-union employees in agency shop authorized by NLRA state a claim upon which relief may be granted under the First Amendment to challenge items on which unions spend their fees). *Also see Price, supra, cert. petition pending,* 55 U.S.L.W. 3593 (1987) (whether employees in union shop authorized by NLRA state cause of action under First Amendment to challenge union's use of fees). A grant of certiorari is therefore necessary to prevent the decision of the New York Court of Appeals from prematurely establishing potentially erroneous legal standards in New York State.[3]

D. *The Decision Below Vastly Expands the Scope of Constitutional Causes of Action*

The New York Court of Appeals has constitutionalized a panoply of customer complaints against regulated industries. Customers of banks, airlines, taxicabs and utilities have long had the statutory right to seek judicial review of administrative agency determinations with which they disagree. They have always had the right to boycott private business, to exercise their own right of free speech to dissuade others from supporting the company, or to dissuade the company from continuing its objectionable practices. Under the instant decision, however, customers would

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[3] The court's ruling on the presence of state action will remain the law of New York State even if the state courts ultimately find no First Amendment violation. It is therefore appropriate and necessary that this Court resolve the state action issue before further state proceedings occur.

have the novel Constitutional right to challenge, and perhaps determine, the spending decisions of private businesses.

Charitable contributions make up a portion of a utility's operating expenses, along with many other categories of expense such as employee salaries and the costs of operating plants. Presumably, utility customers may now challenge the constitutionality of a utility's decision to locate its plants in certain areas, or its employee salary structure. Indeed, the Court of Appeals has imbued a company's customers with a Constitutional right not possessed by the company's own shareholders.[4]

The *Cahill* decision not only attributes State action to a private corporation, but it also attributes actions of private businesses to the State. *Cahill* imposes an affirmative duty upon the PSC to scrutinize the expenditures of utilities for compliance with Constitutional mandates. The PSC would apparently be free to, and in fact constitutionally compelled to, examine utility expenditures for ideological, moral, or political content, and determine whether on such criteria the utility should include them within their proposed rates. Rather than protecting First Amendment rights, the decision below only creates further entanglements.

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[4] Alternatively, utility shareholders in New York may now challenge the PSC's state action in "compelling" charitable contributions to come out of shareholder profits, rather than out of the prices charged to customers, as would be the case in the absence of PSC action.

CONCLUSION

For the reasons stated, the petitions for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted,

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